entirely to new men; for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.

There are a few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making concurrence of the Senate necesssary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occa-

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sions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective, if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other.

But to this plan, as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of

NOTE ATTACHED TO OGC 72-1178

OGC 72-1178

10 August 1972

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Protection of National Intelligence Estimates (NIEs)

1. This memorandum contains a recommendation in paragraph 7 for approval by the Director of Central Intelligence.

2. On 4 August, in the absence of Mr. Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, Department of Justice, I met with one of his Deputies, Mary C. Lawton, and two other members of his staff, Mr. Robert L. Saloschin and Mr. Herman Marcuse, to discuss the question of whether NIEs and SNIEs could, as a category, be considered privileged documents as against Congress and the courts.

3. I gave them the history of the Agency and the reasons for its establishment, including the principle of objective, unbiased intelligence reporting. In describing the estimative process, I pointed out that although ONE and the other intelligence components all contributed and the papers were coordinated through USIB, the papers themselves were the Director's papers as his most complete and objective conclusions and estimates on questions of concern to the top policymakers in the field of foreign affairs. I showed them examples of SNIEs in direct response to White House written requirements or NSSM problems, NIEs of the type scheduled far

in advance, and a NIE which was self-generated for the information of policymakers. I also showed them the type of NIE in the nuclear field which for many years we have given to the Joint Committee on Atomic Energy. I pointed out that it was obvious in some of these cases that there were valid grounds for exempting material from automatic declassification because of the sensitive intelligence sources and methods problems or because of the impact on international relations and noted that at least at Mr. David Young's level in the White House there was a question as to whether some of the other NIEs could be so exempted. However, I said this was not the problem immediately before us and that we would go through the regular mechanism set up by Executive Order 11652 with our claim that all NIEs and SNIEs should be exempted from automatic declassification. All present agreed that classification was not in itself a basis for withholding material from congressional committees.

4. Turning to the question of privilege, Justice's basic reaction was the normal approach that each case should be considered on its own merits as to whether there was sufficient basis for the President to assert the claim of privilege. I said that this did not really answer the problem because we were raising in effect a question of principle, that these Estimates were unique documents in that they were not just factual reports but the Director's conclusions and judgments on matters affecting the determination of American foreign policy at the highest level. I further said that it was of the greatest importance that these conclusions and judgments be as frank and objective as possible and not written with the thought in mind that they would be subject to congressional or public scrutiny or debate. Also, they are only partial contributions to the decisionmaking process and in no way controlling. Thus, if other factors control a policy decision which, therefore, appears inconsistent with the intelligence Estimate, the latter could be used as a weapon to attack the Administration. Consequently, I said I felt we needed something more than just a case-by-case review as issues arose. I pointed out that categories had been exempted, as for example the personnel investigation reports which President Truman ordered to be withheld from Congress during the McCarthy era. We agreed that in this case a category had been subjected to a blanket claim of privilege which had been sustained. I also suggested that traditionally such papers as Inspector General reports

had been withheld, and while the Justice officials agreed as a general matter, they said there had been exceptions in this area. We also agreed that as a practical matter even if we obtained a blanket ruling on NIEs, we would still be making an exception in the case of the Joint Committee on Atomic Energy.

5. Mr. Marcuse then suggested that technically the President could issue an Executive Order protecting the category of NIEs and SNIEs, but Miss Lawton said that the issuance of such an Order would probably stir up interest and demands and raise the issue perhaps unnecessarily. I agreed and said I felt an Executive Order was not what we were after. Finally, Mr. Marcuse suggested that there could be an internal paper from the President to the Director of Central Intelligence stating that he did not want NIEs and SNIEs released because of their confidential involvement in his foreign policy decisions. He said that we would then know that we had backing in refusing to release an Estimate and would not have to go to the President unless some special circumstances indicated a need for release in any one case. I said this was the type of arrangement I had in mind and in due time perhaps we should work this out to see if it had the President's approval. Miss Lawton said she thought it might be well to wait until we had resolved the classification and exemption question, and I agreed, subject to the possibility, of course, that we might have a congressional confrontation where the classification would not be an adequate answer. We all agreed that such a confrontation should be avoided if at all possible.

6. The courts are another matter, but at the moment we are not faced with this problem, and we would probably have to handle court cases on an individual basis. Again, it would be helpful to know the President's approach on this.

7. During the discussion, including a wide review of various situations in the past and how they were handled, it was apparent that the Justice officials concerned were very knowledgeable and on the whole friendly despite their understandable reluctance to treat matters of this sort by category. At the moment they are well read into the problem and if we are faced with a

specific issue are, I believe, ready to act swiftly. I recommend that we wait now for the resolution of the classification and exemption issue, inasmuch as if we fail to maintain our position there I understood it was possible that the Office of Legal Counsel of the Department of Justice might back us in seeking an exemption in this area from the Executive Order.

STA

[redacted]

LAWRENCE R. HOUSTON
General Counsel

The recommendation in paragraph 7 is approved

for _____
Director of Central Intelligence

18 AUG 1972
Date

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OGC 72-1101

31 July 1972

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Protection of National Intelligence Estimates (NIEs)

1. This memorandum contains a recommendation in paragraph 7 for approval by the Director of Central Intelligence.

2. The problem of the release of NIEs (including SNIEs) has been in the offing since we started in business, but has really not come to issue except in the case of the Joint Committee on Atomic Energy. Here the Administration decided to comply with the Joint Committee's requests insofar as NIEs pertaining to nuclear developments were concerned, but in some cases deleted information pertaining to other matters. The reasons were based in part on the Joint Committee's statutory charter which directs that "any Government agency shall furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy" and in part on its demonstrated capability and willingness to protect classified information. But the main point was that in the atmosphere of the times the Executive Branch did not want to get into a major struggle on executive privilege on this particular issue.

3. It appears that the question may well come up for decision again in the near future. Two aspects are involved--the first is classification; the second is executive privilege.

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4. As to classification, we have had considerable discussion with David R. Young of The White House, and the basic disagreement has come clear. Mr. Young feels it would be inconsistent with the new Executive Order 11652 on classification to make a blanket determination that all NIEs are exempt from the automatic declassification provisions of the Order. His position is that each NIE would have to be looked at, and unless we can take a valid position that a NIE involved intelligence sources and methods which should be protected, or one of the other bases for exemption, it would have to come under the 10-, 8-, or 6-year automatic declassification rule, the time depending on the original classification of the document. I have argued the position that NIEs by their nature generically involve intelligence sources and methods, foreign relations matters, information furnished by foreign governments, and in some cases other specialized information which justify a general exemption. Mr. Young claims this would defeat the whole purpose of the Executive Order. I understand this is one of the issues you wish to discuss with Ambassador Eisenhower.

5. It may be that our position on classification will not in the end be upheld under the Executive Order, as in certain specific cases it is difficult to determine the basis for exemption. If so, I have long felt and have occasionally mentioned that NIEs may come within the accepted definition of privileged documents. Executive privilege is the constitutional authority of the President to withhold documents or information in his possession, or in the possession of the Executive Branch, from compulsory process of the Legislative or Judicial Branch of the Government. The doctrine derives from the concept that the President is in the best position to judge what would be improper to reveal to the Congress or to the public. In certain cases classification may be a part of Presidential consideration; however, classification is not in itself a basis for refusing to furnish information to a committee of the Congress having jurisdiction of the matter involved. Executive privilege, however, while widely debated as to how and under what circumstances it can be exercised, has been recognized since the founding of our constitutional system. As stated by Mr. Rehnquist on behalf of the Department of Justice

before the Subcommittee of the Committee on Government Operations at its hearings on the Pentagon Papers in June 1971, at page 362, "It includes the confidentiality of conversations with the President, of the process of decisionmaking at a high governmental level, and the necessity of safeguarding frank internal advice within the executive branch." The formal position of the Attorney General is, "There is no power in Congress or the courts to compel the President's discretion or decision, respecting the propriety of surrendering papers, documents, or information deemed by him to be confidential in character, and the same holds true for the heads of departments."[1] In recent administrations, however, including the present one, the President has specifically directed, in writing, that assertion of executive privilege with the Congress would be made only by the President on the advice of the Attorney General.

6. It has been my belief that NIEs by their nature fall precisely into the privileged category as being part of the process of decisionmaking at a high governmental level requiring protection as frank internal advice within the Executive Branch. In 1962 in connection with the congressional investigation of the military cold war education and speech review policies, President Kennedy directed the Secretaries of Defense and State not to disclose to their committees the names of any individuals involved in the speech-making process, explaining that changes in those speeches were made on the responsibility of the Secretaries themselves. President Kennedy said, "It would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice." The Chairman of the Subcommittee, Senator Stennis, upheld the claim of privilege. While different congressmen take different views of the scope of

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[1] "The Power of the President to Withhold Information From the Congress," Memorandums of the Attorney General, printed for the use of the Committee on the Judiciary, 1958, p. 72.

executive privilege, some even denying its existence, the courts have consistently held that the President's assertion of executive privilege, particularly in the field of foreign affairs, is clearly within the prerogatives of the President.

7. As a practical matter, I believe we would not have too much difficulty with our own Subcommittees as presently constituted for a claim of privilege in connection with our formal NIEs. The question is whether we could get Presidential backing for such a position. The technical procedure, prescribed in President Nixon's memorandum of March 24, 1969, is to discuss any claim of privilege in the first instance with the Office of Legal Counsel, Department of Justice. I recommend that I do so. If you approve, I would appreciate guidance as to the timing and whether you wish to speak first to the Attorney General or the President.

STA

[redacted]

LAWRENCE R. HOUSTON
General Counsel

The recommendation in paragraph 7 is approved

AT

[redacted]

Director of Central Intelligence

31 JUL 1972
Date

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UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

August 16, 1972

Mr. David R. Young
The White House
Washington, D.C. 20500

Dear Dave:

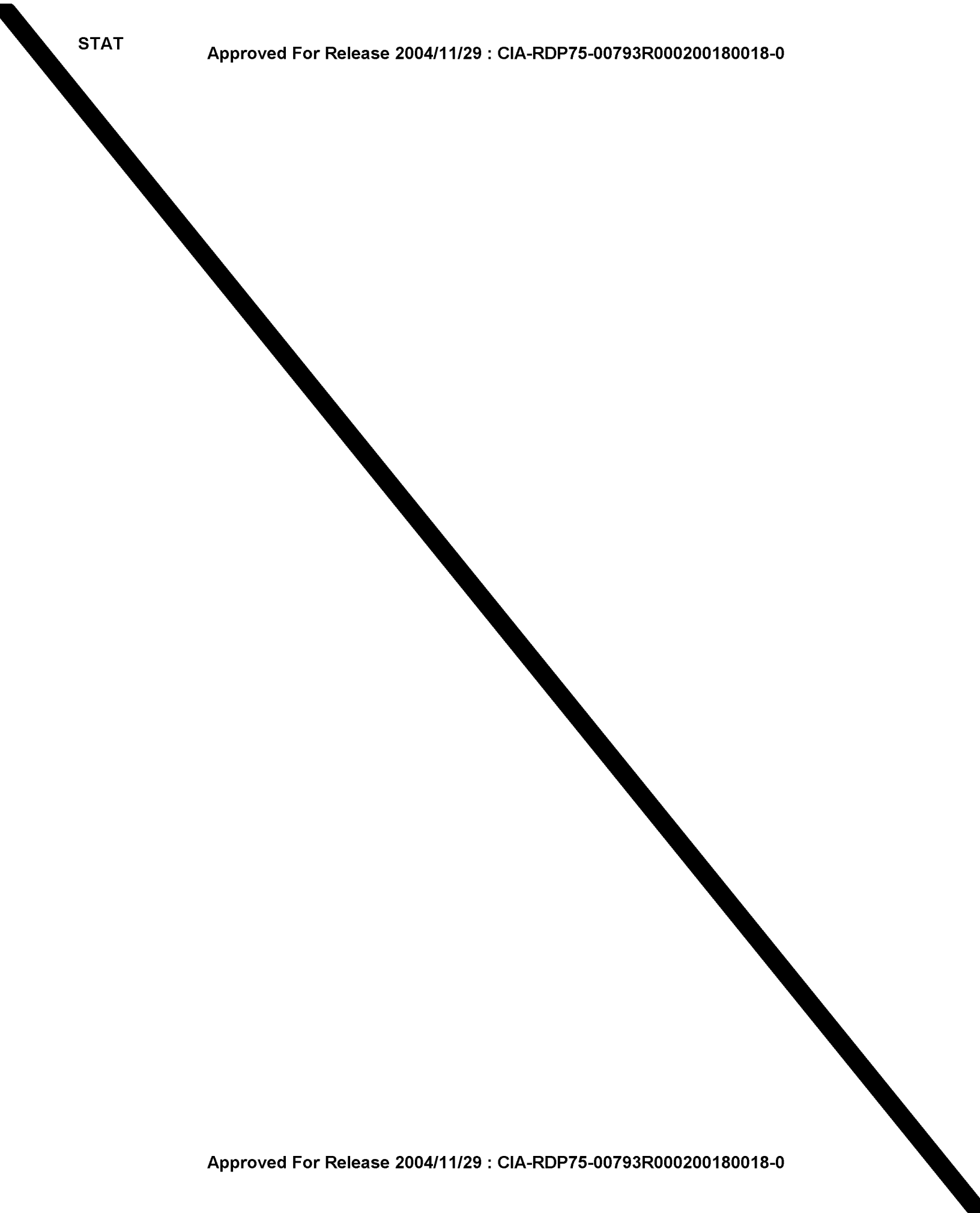
We have reviewed the recommended government-wide procedures, distributed at the August 2, 1972 meeting, for use for access to National Security Information and material by unofficial historical researchers. The proposed procedures appear to indicate that personnel be given access to classified information on the basis of a national agency check. The requirements, based on the Atomic Energy Act of 1954, as amended, are that any individual requiring access to Restricted Data classified Secret or Top Secret must have a full background investigation by the Civil Service Commission or by another government agency which conducts personnel security investigations, provided that a security clearance has been granted to such individual by such other government agency. Access to Confidential Restricted Data may be granted on the basis of a national agency check. In either situation, except for the exemption granted to the DOD and NASA, the clearance for access to Restricted Data has to be granted by the AEC. In view of this clearance requirement, particularly as it relates to Secret or Top Secret information, the use of the standard security clearance application, DD Form 1584, would be inadequate.

We have no objection to the use of the proposed procedures for access to classified information, other than Restricted Data. Any procedure should apply the restrictions prescribed by the Atomic Energy Act not only on access to the historical records of the Atomic Energy Commission but also on access to Restricted Data in the files of any other government agency.

This would be in accord with the long-standing views of the Interdepartmental Committee on Internal Security.

Sincerely,

C. L. Marshall, Director
Division of Classification



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Remarks:

This may be of some utility as a citation in support of our contention that our material falls within the area of executive privilege.

Excellent - file with my WEC memo of communication with Justice on this subject

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